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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1778 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and Sd/-
MISS JUSTICE R.M.DOSHIT Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? - Yes

2. To be referred to the Reporter or not? - Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? - No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - No

5. Whether it is to be circulated to the Civil Judge? -No

DHANIBEN MAKANBHAI TENDEL

Versus

UNION OF INDIA

Appearance:

MR SH SANJANWALA for Petitioner
Respondent No. 1 served
MR JAYANT PATEL for Respondent No. 2

CORAM : MR.JUSTICE B.C.PATEL and
MISS JUSTICE R.M.DOSHIT
Date of decision: 03/05/96

ORAL JUDGEMENT(Per B.C. Patel, J.)

Petitioner has filed this petition in the year 1984, under Article 226 of the Constitution, challenging the order dated 22.3.1978 vide Annexure - "B" passed by the Competent Authority, Bombay, under the provisions contained in Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as "SAFEMA"). This Court issued notice on 29.3.1984. However, no reply was filed and even after issuance of Rule on 3.4.1984, returnable on 18.4.1984, till the matter was called out for hearing, no return, that is to say affidavit-in-reply, is filed by the respondent denying the averments made in the petition. Therefore, this Court taking those averments to be true shall proceed with the matter in the wake of affidavit filed on behalf of the respondent No. 2 stating that the petition is filed before the Apex Court being Criminal Writ Petition No. 224/89 under Art. 32 of the Constitution of India for declaring the proceedings under SAFEMA as illegal and the office of the respondent No. 2 has received/served with the petition of the petitioner herein filed in the Hon'ble Supreme Court of India. The copy of the petition is annexed alongwith the affidavit-in-reply.

2. Learned Advocate for opponent raised a preliminary contention stating that the petition must be rejected as the petition is not on oath. We called upon Mr Sanjanwala to point out the affidavit. Mr Sanjanwala stated that the affidavit is placed on the record of the case and ultimately the same was traced out from the papers alongwith Farad (other papers of the matter). The same was sworn before the notary public for Bulsar and [Daman, State of Gujarat, and therefore, it is clear that the petition is on oath. Mr Patel stated that he has seen the record and could not trace out the affidavit and he was under the impression that the affidavit is for service as the same was alongwith the process. Before raising the contention that petition is not on oath, no care is taken and without responsibility statement is made. It is to say that no importance is required to be given to such argument as the affidavit is there.

3. In the petition filed before this Court, the petitioner has indicated that brother of petitioner's husband was detained under the provisions contained in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1973 (hereinafter referred to as "COFEPOSA Act"). In view of the detention order, the petitioner was served with a notice under the provisions contained in SAFEMA. It is stated on oath in the

petition that the detenu was originally detained on December 19, 1974. The said order was challenged before the Delhi High Court and by judgment and order dated April 18, 1975 passed in Writ Petition No. 1 of 1975. the detenu-brother of petitioner's husband was released and the order of detention against the said detenu was quashed and set aside. In spite of the order being set aside in the year 1975, in the year 1978, vide Annexure "B" dated 22/3/1978 the Competent Authority, Bombay, passed an order u/s. 7 of SAFEMA forfeiting the property held by her to the Central Government free from all encumbrances. No doubt, as the order indicates that the petitioner was given a fair opportunity of hearing by issuance of a registered notice which was refused by her, and thereafter she was served by affixture and it will be seen from the record that she has not chosen to appear before the Competent Authority. The Competent Authority, passed the order ignoring the fact that the order passed by the Detention Authority under the COFEPOSA Act has been set aside by the Delhi High Court. Appeal preferred against the order passed by the Competent Authority, Bombay, came to be dismissed for default by the Appellate Tribunal in F.P.A. No. 150/79-80 dated July 18, 1983. It appears that, thereafter, the petitioner came to know about the decision of the Apex Court in the case of Union of India & Ors. Vs. Haji Mastan Mirza delivered on February 23, 1984 and the decision of the Bombay High Court reported in the case of Rajabally Hirji Meghani vs. Union of India & anr. 1983 (2) Bom. C.R. 5. It appears that, thereafter, an intimation by a registered letter was forwarded to the Competent Authority vide annexure - "E" dated 22.3.1984 pointing out the details. It was also pointed out that the decision rendered in the case of detenu has been set aside on 18.4.1975 and has been reported in a journal "The Lawyer" which is being published from Madras. (It is also indicated in the petition filed before Apex Court that the same is reported in I.L.R. (1975) II Delhi 820. See page 3 para 5 of the petition annexed with the affidavit-in-reply). It was pointed out that in view of the fact that the order of detention was quashed and set aside by the competent Court, the SAFEMA does not apply at all. Obviously as argued by Mr Sanjanwala, the order being set aside, the Competent Authority had no jurisdiction to exercise powers under SAFEMA and therefore, the same is required to be quashed and set aside as the Competent Authority had no jurisdiction to pass the order.

4. In the case of Union of India V/s. Haji Mastan (Supra) a show cause notice under SAFEMA was issued founded on detention order under COFEPOSA and ultimately

properties of detenu and his relatives were confiscated. All aggrieved persons except one filed appeals against the said order before the Appellate Tribunal constituted under the Act and were pending when appeal was being heard by the Apex Court. They also preferred application challenging the vires of certain provisions of COFEPOSA and SAFEMA which was also pending before the High Court when the appeal was being heard. Respondent Haji Mastan, filed a petition challenging the validity of detention order for showing that the action taken under SAFEMA is unsustainable. The High Court allowed the petition declaring order of detention and declaration under COFEPOSA as illegal, null and void ab-initio and inoperative and also consequently quashed the process under SAFEMA restraining authority from taking any action on the basis of detention order. Apex Court dismissed the appeal and held that "Therefore, the detention of the respondent was bad in law and the order of detention could not be sustained and is liable to be quashed. Consequently action taken u/s. 6 and 7 of SAFEMA is baseless and unsustainable in law. The conclusion reached by the learned Judges of the High Court based on that ground is correct". Mr Sanjanwala, submitted that in the instant case the Competent Authority, Bombay, had no jurisdiction to pass the impugned order because the date on which notice was issued (date is 29.1.1977 of issuance of notice as per Annexure-"B" order passed Competent Authority, Bombay) there was no detention order as the same was quashed and set aside by Competent Court on April 18, 1975.

5. Mr Patel, learned advocate appearing for the opponent has filed an affidavit as indicated above. The petition which he has annexed to the affidavit-in-reply and which is pending before the Apex Court refers to six detention orders. From the contents of that petition, Mr Sanjanwala submitted that the petitioner has challenged letter dated 13.2.1989 Annexure-1 to the petition. Mr Sanjanwala submitted that from the letter Annexure-1 it appears that the property belonging to Makanbhai Naranbhai Tandel is forfeited and therefore, the Mamlatdar was requested to take appropriate action. He submitted that there is nothing to say that it is with regard to the same order which is a subject matter of this petition. The petition is preferred in the year 1984 and Rule was made returnable on 18.4.1984 protecting the petitioner, and therefore, there was no need for the petitioner to file another petition. We find some substance in the say of Mr Sanjanwala. Mr Sanjanwala is pointing out that in the petition which is annexed by the opponent, there is a reference to six detention orders

and there is nothing to indicate that the subject matter filed in this Court is the same subject matter before the Apex Court. Mr Patel, learned advocate appearing for the opponents submitted that it is the same subject matter, and therefore, parallel proceedings should not be entertained. Opponent has relied on the affidavit and the copy of the petition. Letter Annexure-1 to the petition, if read, there is no indication that it is in connection with the order passed by Competent Authority, Bombay, under the provisions contained in SAFEMA for which the petition is filed in this Court. Even from the letter, it appears that the recovery is from 6.2.1987 to 6.2.1989. So far as the order which is under challenge before this Court, there cannot be any recovery in view of the order passed by this Court and the department has not placed before this Court anything on record to indicate that the order which is impugned in this petition is also a subject matter before the Apex Court. Even affidavit does not indicate that any order of detention passed subsequently is confirmed and not set aside. The matter was part heard. However, we adjourned to the second session today. Till this moment, no further affidavit is filed by the opponent and the time was sought. We have rejected that request. Mr Patel stated that he has got record with him and the officer is present. When we were questioning that if the details are not given or the order is not specifically referred by indicating number, date and the authority which passed the order, how the authority is justified in submitting that it is the same order, and it was stated that a fresh show cause notice was issued in connection with the subject matter. If there is stay granted by this Court mere statement is not sufficient to substantiate the contention. Authority is aware that order is stayed and hence, there is no question of fresh show cause notice. We think that the authority could not have issued any show cause notice with regard to the subject matter pending before this Court and notice issued may be with regard to other subject matter. Opponent has placed nothing on record to support its version.

6. Mr Patel submitted that no material is produced and even appeal is dismissed for non prosecution and therefore, this petition should not be entertained. If there is no denial about setting aside the order of detention on the basis of which impugned order is passed the order is without jurisdiction, the same must be quashed. Mr Patel requested the Court to peruse the file. It was for the department to file an affidavit alongwith necessary documents in time, so that the petitioner may get an opportunity to controvert the

statement if need be. Mr Sanjanwala, strongly objected this request stating that Court may peruse file in a case where the matter is under investigation but after the investigation is complete, the affidavit must be filed. he stated that he will have no opportunity to meet with documents on which reliance is placed. He submitted that even officer concerned is not certain, otherwise he would have stated in affidavit filed before this Court that the same proceedings are challenged before the Apex Court, but has advisedly not stated and advocate is asking the Court to find out from the file that the same order is challenged before the Supreme Court. We have rejected the request of Mr Patel. The Court looks to the file if the matter is at the stage of investigation or to satisfy its conscience if it notices ambiguities in the stand. The Hon'ble Supreme Court in the case of Rajindra V/s. Commissioner of Police, reported in 1994 (Suppl.) 2 SCC Page 716 has deprecated the method of showing files to the Court and has observed as under :-

" The Court is expected to go by the pleadings and the Central Government is expected to place the factual material in connection with the detention order by filing a counter-affidavit so that the petitioner has an opportunity to meet with the factual information. The indulgence shown by the Courts in perusing the file seems to have given an impression that the Central Government is under no obligation to file a counter-affidavit to explain the delay. This impression has to be removed once and for all. The Central Government is under obligation to file its counter within the time permitted by Court failing which the case may go by default. Production of the file is not a substitute for a counter to be filed by the Central Government. The Court peruses the file not to absolve the Central Government of its responsibility to file a counter but to satisfy its conscience if it notices ambiguities in the Government's stand. If the Courts have shown indulgence by perusing the file where affidavit is not filed for good reason, let that indulgence not be misused by construing it to be a licence to dispense with the obligation to file a return."

Inspite of the decision, even the advocate for respondent (for the Union of India) has suggested the Court to peruse the files. Though respondents are served long before, (before 12 years) no care is taken to file a

reply. Matter was heard earlier and was adjourned yet affidavit is not filed. Petition was heard again yesterday and remained overnight part heard, yet no return is filed. Even today in the first sessions we adjourn the matter to second session, but not return is filed. This has created an impression that Advocate for the Union of India has taken for granted that it is not the responsibility of the Union of India to file an affidavit. We do not approve this method and we depreciate the improper stand taken on behalf of the Union of India asking the Court to peruse the file of the department to find out that the order challenged before this Court is also challenged before the Apex Court. We will indicate hereafter from the contents of the memo of application filed before the Apex Court that the orders are passed by different authorities and subject matters in both the petitions are different.

7. Mr Sanjanwala, learned advocate for the petitioner pointed out from the copy of the petition filed before the Apex Court at page No. 7 which reads as under :-

> "However, the competent authority, Ahmedabad, erroneously applied and provisions of the said SAFEMA Act in respect of the property belonging to the deceased husband of the petitioner Shri Makanbhai Naranbhai Tandel. As a result, the Competent Authority illegally forfeited the property bearing No. 8-323 situated at Parkota Sheri, NANI DAMAN, in February 1987; and as a result thereof, the competent authority directed the forth respondent i.e. the Mamlatdar of Daman to recover an amount of Rs. 40,200/- at the rate of Rs.1675/- per month for the period from 6.2.1987 to 6.2.1989 in respect of the illegally forfeited property of the petitioner's husband No. 8-323 situated at Parkota Sheri, NANI DAMAN."
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> .... (produced verbatim)

8. Mr Sanjanwala pointed out that it is very clear from the averments that there is an order passed by the Competent Authority at Ahmedabad in February 1987. It is required to be noted that the impugned order is passed by the Competent Authority, Bombay. In view of clear picture, we fail to understand how learned Advocate for opponent stated that the order is the same. We find no merits in contention raised by the learned Advocate for

opponent that parallel proceedings have been initiated.

9. In the result, application is allowed. Impugned orders Annexures - "B" and "C" are quashed. Rule made absolute with costs.
